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No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT C. HERZFELD, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO AND THE HONORABLE FRED M. WINNER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April 25, 1983

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QUESTIONS PRESENTED

1. Whether the United States District Court for the District of Colorado acted in excess of its jurisdiction in establishing a receivership in a criminal proceeding, in light of the precedent established by the decision of this Court in *Hammock* v. *Farmer's Loan and Trust Company*, 105 U.S. 77, 26 L.Ed. 1111 (1882) holding that a receivership established without express statutory authority is illegal.

2. Whether the restitution statute, 18 U.S.C. Section 3651, permits a Criminal Court to invoke the drastic civil equitable remedy of a receivership as a distribution device which would apparently function unrestrained by the legislated distribution priorities in the appropriate Rules of Civil Procedure, State Statutory Law, and Federal Bankruptcy Law.

3. Whether the administration of restitution through a receiver established in a criminal proceeding, under 18 U.S.C. 3651, comports with due process requirements.

4. Whether Rule 57(b) of the Federal Rules of Criminal Procedure should be given an unprecendented construction, greatly expanding the powers that a criminal court may invoke, and making the equitable jurisdiction of a civil court available to a criminal court so as to empower the United States District Court for the District of Colorado to establish a receivership in a criminal action.

5. Whether post-judgment execution issued by the United States District Court for the District of Colorado in a civil action can attach to assets in possession of an illegal receivership established by a coordinate division of the United States District Court for the District of Colorado in a criminal action.

PARTIES

Parties to Proceedings that were consolidated and decided with this case below, not named in the caption, are:

Petitioners: Robert F. Brown, Robert A. Brant and RFB Petroleum, Inc., a Texas Corporation, Elizabeth Eken and William Johnson.

Respondents: Trenton H. Parker, The International Mining Exchange, Inc., a Colorado Corporation, R. Steven Spangler, James T. Wilson, Adrian Doyle and Robert Norwood.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. _____

ROBERT C. HERZFELD, *et al.*,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO AND THE HONORABLE FRED M. WINNER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit has not yet been reported. It appears in the appendix to this petition. The opinion and order of the United States District Court for the District of Colorado, dated July 26, 1982, which was one of the orders reviewed by the Court of Appeals is included in the appendix to this petition. The order of a coordinate division of the District Court for the District of Colorado, dated July 26, 1982, which was not specifically reviewed by the United States Court of Appeals, but which was an inseparable part of the conflict which arose between coordinate divisions of the United States District Court for the District of Colorado, is included in the appendix to this petition.

The order of the United States District Court for the District of Colorado, establishing a receivership in a criminal proceeding, from which the herein-described conflict arose, is included in the appendix to the petition. The Court of Appeals consolidated the various proceedings, all of which related to the order of the United States District Court for the District of Colorado which established the receivership.

Petitioner, Robert C. Herzfeld had appealed the order of the United States District Court for the District of Colorado dated July 26, 1982. Petitioner Herzfeld had also petitioned the United States Court of Appeals for the Tenth Circuit for a writ of prohibition. This Court is asked to review the opinion of the United States Court of Appeals for the Tenth Circuit dated January 31, 1983, affirming the order of the United States District Court for the District of Colorado, dated July 26, 1982, and denying the motion of petitioner Herzfeld for a writ of prohibition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1983. A timely Petition for Rehearing was filed by petitioner, Robert C. Herzfeld, on February 14, 1983. The Petition for Rehearing was denied on March 7, 1983. This petition was filed within ninety (90) days of that date. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. 3651

Fed. R. Crim.P. 57

5th Amendment to the United States Constitution

(See Appendix)

STATEMENT OF THE CASE

The consolidated appeals which form the subject matter of the within petition arise out of two federal district court civil actions, and one federal district court criminal prosecution. The civil actions are pending in the District of Colorado (Robert C. Herzfeld, et al. v. Trenton H. Parker, et al., Civil Action Nos. 80K850 and 80K859), and in the District of New Jersey (Elizabeth Eken, et al. v. International Mining Exchange, et al., Civil Action No. 81-3990). The criminal prosecution is pending in the District of Colorado (United States v. Parker, et al., Criminal Action No. 81CR122). In the above-mentioned civil actions, jurisdiction of the federal courts was invoked, in the first instance, under 15 U.S.C. 77(v).

In addition, Plaintiffs in five civil actions pending in the state courts of the State of Colorado (Herzfeld, et al. v. Parker, et al., Denver District Court No. 80CV558; Croke-Patterson-Campbell Mansion, Ltd. v. Parker, et al. Denver District Court No. 81CV2624; Malo Mansion, Ltd. v. Parker, et al., Denver District Court No. 81CV2625; Tears McFarlane, Ltd. v. Parker, et al., Denver District Court No. 81CV2626; Bernes v. Parker, Denver District Court No. 79CV8589; Cassimally v. Parker, Denver District Court No. 82CV1417) will also be directly affected by the outcome of these proceedings.

The plaintiffs in all of the above-described actions sought money damages against Trenton H. Parker. In the aggregate, final judgments in excess of fourteen million dollars have been entered by the above-mentioned state and federal courts against Trenton H. Parker. The state court actions were brought by numerous investors

and limited partnerships, who had been defrauded, by Mr. Parker, through a variety of investment schemes, involving closely-held and completely controlled corporations, in the years 1974 through 1980. The federal district court actions arose out of Trenton H. Parker's activities in connection with his 1979 and 1980 Gold Tax Shelter investment schemes. Through these schemes, Mr. Parker offered investors a five hundred percent (500%) write-off in the tax year in which an investment was made, plus the prospect of appreciation through ownership of placer gold mines.

On or about July 22, 1981, an indictment was returned by the Federal Grand Jury in Denver, Colorado, against Trenton H. Parker based upon his involvement in the above-mentioned "Gold Tax Shelter" investment schemes. Mr. Parker was prosecuted in United States v. Parker, Case No. 81CR122. The prosecution against Mr. Parker was limited to his activities in connection with the 1979 and 1980 Gold Tax Shelter investment schemes.

After Trenton H. Parker's criminal trial had proceeded for one week, a plea bargain was reached, whereby Trenton H. Parker delivered approximately Six Million Dollars ($6,000,000.00) to the United States District Court for the District of Colorado. A portion of the plea bargain provided that the United States District Court for the District of Colorado in Case No. 81CR122 (the criminal proceeding) would establish a receivership, and the Six Million Dollars ($6,000,000.00) would be returned only to investors in the Gold Tax Shelter investment programs, and only to the extent of said investors actual investment. The Plea Agreement is included in the appendix to this petition. No consideration was given to whether the Six Million Dollars ($6,000,000.00) was derived from Gold Tax Shelter victims, or whether this sum also included

monies obtained through Trenton H. Parker's other fraudulent activities.

Apparently Trenton H. Parker insisted upon the establishment of the receivership because he did not wish those litigants who had pursued him through the state and federal courts to satisfy their judgments from the proceeds surrendered as part of the plea bargain. Accordingly, the option of filing a petition in bankruptcy was apparently rejected. A proceeding in bankruptcy utilizes established procedures and priorities for resolving claims between competing parties. In bankruptcy proceedings, Mr. Parker could not have been assured that his pursuers would not be rewarded.

The United States District Court for the District of Colorado therefore established a receivership in Case No. 81CR122. The surrendered money was transferred to William C. Lam as receiver. Petitioner Robert C. Herzfeld and all of the other investors who had brought civil actions against Trenton H. Parker could find no authority for the proposition that a United States District Court in a criminal action could legally invoke the drastic civil remedy of a receivership. Relying upon the precedent established by this Court in the case of *Hammock* v. *Farmers Loan and Trust Company*, 105 U.S. 77, 26 L.Ed 1111 (1882), petitioner Robert C. Herzfeld and all of the other defrauded investors in the state and federal civil actions served writs of garnishment upon the depository institutions in which the receiver had placed the surrendered money, and upon William C. Lam.

The coordinate divisions, civil and criminal, of the United States District Court for the District of Colorado each separately considered the conflict between the divisions regarding control of the distribution of the surrendered money. Additionally, the United States District

Court for the District of New Jersey apparently felt that it was the proper court to preside over the distribution of the surrendered money. In their analyses, the coordinate divisions of the United States District Court for the District of Colorado each addressed the issue of whether a criminal court had the authority to establish a receivership, finding the question to be unprecedented, and finding the issue to present a "close question." In Case Nos. 80K850 and 80K859, the civil action, Judge Kane stated in his order of July 26, 1982, that:

> "The Plaintiffs in the consolidated actions, 80-K-850 and 80-K-859, argue that there is no inherent power which permits United States District Courts to appoint a receiver in criminal proceedings. No authority has been cited by any party and I can find none which addresses this question."[1]

In the criminal proceeding, 81CR122, Judge Winner stated in his order, issued the same day, July 26, 1982, that:

> "The only question actually decided by Judge Kane was whether funds in the hand of a Receiver could be garnished without permission of the appointing Court, and I have found no case which even hints that such a Garnishment is legal. However, perhaps ingenious counsel can structure the case *to obtain review of the undecided question of the receiverships legality, and I agree that this is a close question.*" [Emphasis added.][2]

The Tenth Circuit Court of Appeals implicitly recognized the importance of this issue by exercising its discretion to hear these consolidated appeals under 28 U.S.C. 1292, and further recognized the closeness and import-

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[1] See Opinion of Judge Kane, Appendix D.

[2] See Judge Winner's order of July 26, 1982, Appendix E.

ance of the questions herein presented by granting petitioners' motions to stay mandate.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS AFFIRMING THE ORDER OF THE UNITED STATES DISTRICT COURT WHICH APPOINTED A RECEIVER IN A CRIMINAL CASE HAS NO SUPPORT IN THE APPLICABLE STATUTORY AND DECISIONAL LAW, AND DIRECTLY AND IRRECONCILABLY CONFLICTS WITH PRECEDENT ESTABLISHED BY THIS COURT.

The decision of the United States Court of Appeals affirms the establishment of a receivership by the United States District Court for the District of Colorado to effect restitution in a criminal action. The utilization of a receivership combines the powers of the district court in its criminal and civil jurisdictions to an extent previously thought to be impermissible. Equity jurisdiction is adopted within the criminal jurisdiction of the district court for the first time.

In its opinion, the United States Court of Appeals recognized that 18 U.S.C. 3651 "does not delineate what, if any, special powers are granted to the sentencing court to create means by which restitution might be accomplished,"[3] and further recognized that "there is no machinery provided or required to accomplish the restitution itself."[4] However, the court of appeals held that "the authority to create the receivership should be considered as implicit in the power to order restitution."[5]

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[3] See Appendix A at page 7.

[4] See Appendix A at page 9.

[5] See Appendix A at page 9.

The decision of the United States Court of Appeals for the Tenth Circuit contravenes the established principle that the district courts are courts of limited jurisdiction and have only the powers which are conferred upon them by acts of Congress. *Jones* v. *United States*, 137 U.S. 202 (1889). Congress has not enacted any statute authorizing the appointment of a receiver in a criminal action. In contrast, the appointment of a receiver in a *civil* action has been explicitly approved by Congress. *E.g.*, 28 U.S.C. 7402(a); F.R.Civ.P. 66.

There is no prior published judicial decision which approves the appointment of a receiver in a criminal action. The overwhelming weight of authority indicates that the appointment of a receiver is a drastic civil remedy available to courts of equity. See *E.g.*, *Lyon Bonding Co.* v. *Karatz*, 262 U.S. 77 (1922). *See, generally, Clark on Receivers*, Chapter III, § 46; 30 CJS, *Equity*, § 53. William Blackstone, in the year 1765, explained equity and its inapplicability to a criminal action as follows:

> What equity is, and how impossible in it's very essence to be reduced to stated rules, hath been shewn in the preceding section. I shall therefore only add, that there are courts of this kind established for the benefit of the subject, to correct and soften the rigor of the law, when through it's generality it bears too hard in particular cases; to detect and punish latent frauds, which the law is not minute enough to reach, to enforce the execution of such matters of trust and confidence, as are binding in conscience, though perhaps not strictly legal; to deliver from such dangers as are owing to misfortune or oversight; and, in short, to relieve in all such cases as are, bona fide, objects of relief. This is the business of our courts of equity, which however are only conversant in matters of property. *For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law*

> *otherwise than according to the letter.* [Emphasis Added.][6]

The court of appeals should have been guided by this Court's opinion in *Hammock* v. *Farmers Loan and Trust Co.*, 105 U.S. 77, 26 L.Ed. 1111 (1882). The order of the lower court creating a receivership was held to be void in *Hammock, supra*, because the statute under which the court acted did not expressly authorize the appointment of a receiver. Thus even in civil jurisdiction, where the use of a receiver is recognized, a receivership is void without an authorizing statute or rule. The holding of this Court in *Hammock* v. *Farmers Loan and Trust Co., supra*, precludes the use of a receiver in the instant action since there is no authorizing statute or rule.

This Court also held that a receiver acting under color of a void order purporting to appoint him is subject to valid orders of attachment and garnishment of other courts. *Hammock* v. *Farmers Loan and Trust Co., supra.*

The United States Court of Appeals affirmed the unprecedented utilization of the powers of equity by the district court in a criminal action. The court's equitable powers have traditionally been reserved to the court's civil jurisdiction. The court of appeals' decision, if not reviewed, will effectively overrule the reasoning of *Hammock* v. *Farmers Loan and Trust Co., supra.* For this reason, the decision of the court of appeals should be reviewed by this Court.

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[6] *Commentaries on the laws of England*, William Blackstone, a Facsimile of the First Edition of 1765 to 1769, Volume 1 at page 92.

II. THE VALIDITY OF THE APPOINTMENT OF A RECEIVER TO EFFECT RESTITUTION UNDER 18 U.S.C. 3651 IS AN IMPORTANT QUESTION OF FIRST IMPRESSION DEALING WITH THE CONSTRUCTION AND APPLICATION OF THE RESTITUTION STATUTE WHICH WILL AFFECT CRIMINAL PROSECUTIONS AND PLEA BARGAIN ARRANGEMENTS NATIONALLY.

The United States Court of Appeals for the Tenth Circuit has considered the breadth of the power granted to the district court by Congress, in 18 U.S.C. 3651, to effect restitution. The resolution by the Court of Appeals is far too broad to prevent abuse of the restitution system (as argued in Sections III and IV, infra). The opinion of the court of appeals, if not reviewed by this Court, will be used as authority to increase the power of the district courts in creating selective restitution in plea bargain agreements, to the detriment of the crime victims.

Whether the district court is empowered to establish a receivership to effect restitution is a question of first impression. The Court of Appeals apparently presumed that Congress had not specified a restitution procedure with the intent of leaving the method of restitution to the court's discretion. Accordingly, the Court of Appeals gave 18 U.S.C. 3651, a broad construction, including within its scope the "implicit" power to establish a receivership. This conclusion is unsupportable for three reasons: (1) the criminal jurisdiction does not include equity; (2) Rule 57(b) F.R.Crim.P. is not a provision which allows the adoption of any proceeding known to the law; and (3) the reason that no procedure has been provided for restitution is most probably that the restitution statute was not designed to undertake distribution of large sums of money to large numbers of possible victims.

The Court of Appeals has presumed that a district court in a criminal action can exercise general equity jurisdiction. Prior to the decision of the Court of Appeals, a United States District Court was able to exercise general equity jurisdiction in a civil action. The presumption of the Court of Appeals is unprecedented and has never been accepted in a published opinion by any appellate court since the times of Blackstone.[7]

The decision of Court of Appeals would greatly expand the scope of Rule 57(b) F.R.Crim.P. The sanctioning of the use of a receivership, a drastic civil remedy, in a criminal proceeding creates in Rule 57(b) F.R.Crim.P. the authority to invoke any procedure, civil or criminal, known to the law. Apparently, this was the conclusion reached by the Court of Appeals, as at page 11, of its opinion, the Court of Appeals stated:

> The federal courts obviously are of limited jurisdiction but the extent of the authority of the district courts in these circumstances is not limited or governed by whether the proceeding is criminal or civil.

The criminal courts have always been courts of limited jurisdiction constrained to operate within the statutory authority provided by Congress. The willingness of the Tenth Circuit Court of Appeals to allow the district courts in a criminal action to roam beyond the boundaries of the codified criminal law is unprecedented and could have widespread ramifications throughout the criminal justice system.

An examination of the restitution statute, 18 U.S.C. 3651, will demonstrate that Congress never contemplated that the restitution statute would be utilized to distribute millions of dollars to thousands of claimants

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[7] See *Commentaries on the Laws of England, supra*, at page 8.

whose entitlements had not previously been adjudicated.[8] The contemplation of the restitution statute, rather, appears to have been to allow direct compensation to victims through the probation department.

In complex cases other alternatives exist through which restitution could be accomplished. The Bankruptcy Court is equipped to resolve conflicts of priority between competing creditors in the distribution of assets. In addition, the vehicle of receivership may be properly invoked in a collateral civil action. There is, therefore, not an overriding necessity that complex restitution be effected by a receivership in a criminal action.

The Congress must weigh all relevant factors to decide that the drastic equitable civil remedy of receivership may be utilized in a criminal action to make restitution under 18 U.S.C. 3651. Congress has not conferred this power upon the criminal court. Arguably Congress could not confer such power without incorporating a method of determining distribution priorities. The broad and flexible receivership power, requiring "the exercise of highest discretion and embracing a very wide field of judicial investigation and inquiry" (see *Hammock* v. *Farmers Loan and Trust Co.*, *supra*, at 1114) should not be deemed implicitly contained within 18 U.S.C. 3651.

The issue of whether the power to establish a receivership to effect restitution "implicity" exists in 18 U.S.C. 3651 has not been determined by this Court and, because of its overwhelming importance for the administration of the entire criminal justice system, and for the permissible scope of plea bargains throughout the nation, this Court should review and pass upon this issue.

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[8] See Appendix G at page 29a.

III. THE INTERPRETATION OF RULE 57(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE ADOPTED BY THE COURT OF APPEALS WILL PERMIT A FEDERAL CRIMINAL COURT TO ASSUME UNLIMITED, BROAD, AND UNPRECEDENTED POWERS.

Rule 57(b) of the Federal Rules of Criminal Procedure was never intended to allow a court to assume every power in a criminal action which it deems expedient to accomplish its statutorily-specified goals. Such an approach is antithetical to the approach adopted by the criminal justice system, and secured by the United States Constitution.

Prior to the decision of the Court of Appeals on January 31, 1983, Rule 57(b) F.R.Crim.P. had been used to eliminate requirements of conformity to state procedure. The Rule was applied to resolve such minor questions as the mode of impaneling a jury, the manner and order of interposing challenges to jurors, the manner of selecting the foreman of a trial jury, the manner of sealed verdicts, and the order of counsel's argument to the jury.[9]

Rule 57(b) should not be construed as a vehicle through which a court in a criminal proceeding may seize any power not specifically conferred upon it for expediency. A receivership is a drastic equitable civil remedy. In the sanction of the receivership, the Tenth Circuit Court of Appeals has, in effect, authorized the district court in a criminal case to assume any power in the civil jurisdiction of a district court which it deems expedient. This unprecedented and dramatic extension of Rule 57(b) must be reviewed by this Court. It is in this Court that the ultimate responsibility for the proper functioning of the federal judiciary rests.

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[9] See Moores Federal Practice, 1983 Edition, (57-1), at page 617.

IV. THE OPERATION OF 18 U.S.C. 3651, VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO THE EXTENT THAT IT AUTHORIZES RESTITUTION BY USE OF A RECEIVERSHIP.

A criminal court effecting restitution through a receivership, pursuant to 18 U.S.C. 3651, by arbitrarily assigning priorities among the claims of competing creditors takes the property of those creditors not included in the restitution scheme, or assigned a low priority, without due process of law in violation of the Fifth Amendment to the United States Constitution. The restitution provisions of 18 U.S.C. 3651 totally fail to specify priorities for distribution, which permits the criminal court to establish its own priorities in the distribution of surrendered money. As a practical matter, this allows a criminal defendant to have unwarranted input into the distribution of the restitution fund, as was the result in this case.

Assistant United States Attorney, Robert T. McAllister, stated in oral argument before the Court of Appeals, that a proceeding in bankruptcy was specifically rejected by Mr. Parker. Mr. Parker apparently did not desire that the creditors who had pursued him through various state and federal courts share in the distribution of the surrendered money. It could not have been the intent of Congress to allow a distribution procedure which would give effect to the vengeful dictates of a white collar criminal.

The assumption of power by the district court in a criminal action to administer distribution under the restitution provision of 18 U.S.C. 3651 allows the district court unfettered discretion to favor some claimants over others identically situated. Even the wording of 18 U.S.C. 3651 appears to mandate inequity, as it calls for restitution "to aggrieved parties for actual damages or

loss caused by the offense *for which conviction was had.*" [Emphasis Added.][10]

When dealing with a protracted and complex criminal episode causing pecuniary loss to large numbers of victims, it is not unusual for prosecutors to list only certain victims in the indictment and exclude others, for reasons not bearing in any way upon the validity of the claims of omitted victims. Facility of proof, availability of evidence and witnesses, or complexity and clarity of issues may provide sufficient reason for includng or excluding certain acts in an indictment. To limit recovery to those victims whom a prosecutor chooses to mention in an indictment, and conditioning the victim's possibility of recovery upon the prosecutor's attainment of a conviction for the count involving that victim, is an undesirable and impermissible result.

It is even less desirable to permit a criminal, in a plea bargain, to select the victims he chooses to repay by bargaining to plead guilty only to those counts naming the desired recipients as victims. A criminal should not have the power to select which victims of his crimes are to be paid from the restitution fund, and then to obtain the power of the district court, in a criminal proceeding, to enforce his selections.

In *United States* v. *McLaughlin*, 412 F. Supp. 907 (1981), the district court recognized that the scope of restitution pursuant to 18 U.S.C. 3651 is doubtful and requires resolution. (412 F. Supp. 912.) The factual situation in the instant case presents another situation in which the restitution provisions of 18 U.S.C. § 3651 require definition. The selective distribution in a criminal

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[10] See Appendix A at page 30a.

action, through a receiver, to certain victims, but to the exclusion of other victims identically situated, which distribution is unrestrained and unguided by a statutory distribution scheme, or even stated principles, deprives the victims who are arbitrarily refused restitution of property without due process of law in violation of the Fifth Amendment to the United States Constitution.

CONCLUSION

For these reasons, the writ of certiorari sought by petitioner Robert C. Herzfeld should issue, to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1948

ROBERT C. HERZFELD,

Petitioner,

v.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO and THE HONORABLE FRED M. WINNER,

Respondents.

No. 82-1994
(D.C. Crim. No. 81-CR-122)

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRENTON H. PARKER, INTERNATIONAL MINING EXCHANGE, INC.,

Defendants,

ELIZABETH EKEN, as representative of the class of investors defrauded by Trenton H. Parker and International Mining Exchange, Inc.,

Appellant,

WILLIAM C. LAM,

Receiver-Appellee.

No. 82-2044
(D.C. Civ. No. 80-K-850)

ROBERT C. HERZFELD,
Plaintiff-Appellant,

v.

TRENTON H. PARKER, ADRIAN DOYLE, JAMES T. WILSON, STEPHEN SPANGLER, ROBERT E. NORWOOD and INTERNATIONAL MINING EXCHANGE, a Colorado corporation.
Defendants-Appellees.

No. 82-2045
(D.C. Civ. No. 80-K-859)

ROBERT F. BROWN, ROBERT A. BRANDT and RFB PETROLEUM, INC., a Texas corporation.
Plaintiffs-Appellants,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., a Colorado corporation, R. STEVEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE and ROBERT NORWOOD,
Defendants-Appellees.

No. 82-2046
(D.C. Civ. No. 82-J-17)

ELIZABETH EKEN and WILLIAM JOHNSON,
Plaintiffs-Appellants,

v.

INTERNATIONAL MINING EXCHANGE, INC., et al.,
Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Patrick C. English of Dines, English & O'Kane, Clifton, New Jersey (Walter L. Gerash of Gerash & Robinson, P.C., Denver, Colorado, with him on the brief), for Appellant Elizabeth Eken.

Richard B. Podoll of Podoll and Podoll, P.C., Denver, Colorado, for Appellant Robert C. Herzfeld.

William A. Wilson of William Andrew Wilson, P.C., Denver, Colorado, for Appellants Robert F. Brown and RFB Petroleum, Inc.

Richard N. Stuckey of Keene, Munsinger & Stuckey, Denver, Colorado, for Appellee William C. Lam.

Robert T. McAllister, Assistant United States Attorney (Robert N. Miller, United States Attorney, and Gerald J. Rafferty, Assistant United States Attorney, with him on the brief), Denver, Colorado, for Appellee United States of America.

Before SETH, Chief Judge, BARRETT and DOYLE, Circuit Judges.

SETH, Chief Judge.

FILED
United States Court of Appeals
Tenth Circuit
JAN 31 1983
HOWARD K. PHILLIPS
Clerk

In this case we consider consolidated appeals all of which arise from a somewhat involved set of facts. We set out only the facts necessary to explain our disposition of the matter.

Trenton H. Parker was indicted in Colorado for mail fraud in connection with an investment plan. During his trial he pled guilty in the United States District Court for Colorado under a plea agreement pursuant to which he transferred to that court in Colorado approximately six million dollars which had been on deposit in a bank in the Bahamas. This money was part of the proceeds of the "Gold Tax Shelter Investment Program" which was the particular scheme which gave rise to the criminal charges. Pursuant to the plea agreement and the sentencing, the United States District Judge in Colorado ordered that the money be used for restitution to those investors defrauded by the Gold Tax Scheme. The judge further ordered that the restitution be effected through a receivership and appointed a receiver. This appontment of a receiver during the course of the criminal proceedings and with no pending civil action is contested in each of the instant appeals.

Prior to the criminal proceedings several private investors, among them appellant Herzfeld, filed suits in the United States District Court for Colorado to recover monies lost in some of Mr. Parker's investment plans. After a lengthy discovery process, summary judgment for these plaintiffs was therein granted for about four million dollars. By far the greatest part of that figure represented attorneys' fees and punitive damages. Shortly thereafter (December 23, 1981) a class action was brought in New Jersey on behalf of investors defrauded in the "Gold Tax Shelter Investment Program." The United States District Judge certified the class on January 29, 1982 and issued a restraining order against Barclay's Bank in the Bahamas and others. There were deposits of Mr. Parker in the bank which were proceeds of the Gold Tax scheme.

The Grand Cayman bank had entered no appearance in the class action pending in New Jersey. The government argues that any conformance by the bank to the restraining order

would have been a purely voluntary matter. Thus it points to an affidavit by an Assistant United States Attorney which recites that the bank manager and its counsel advised him, apparently after the fact, that the bank would not honor a restraining order and would instead have transferred the funds on the request of Mr. Parker. Also, the only action taken by the bank was taken after the depositor, Mr. Parker, requested that the funds be transferred to Colorado pursuant to the plea agreement and the funds were so immediately transferred.

We do not decide whether the Grand Cayman bank was or was not bound by the orders of the New Jersey court. The court modified its order about the same time to permit the transfer of funds and the transfer was made in any event. Mr. Parker entered his plea on February 9, 1982 and he directed the bank to make the transfer. As mentioned, the funds were so transferred by the Grand Cayman bank to Colorado, and then into the registry of the court and to the receiver. The receiver was later directed by the instructions of the court given at the sentencing of Trenton Parker. The receiver invested the funds pending their distribution and set about to identify the defrauded investors.

Before any disbursement, the claims here considered were asserted against the funds. The plaintiffs in the Colorado civil actions attempted garnishment of the money in the receivership as did the class action plaintiffs. These parties argued that the receivership was void and that the funds were subject to garnishment. The class certified in New Jersey also moved to have the money transferred into a receivership there. In support of this motion the class also argued that the Colorado receivership was void.

The claims by the parties in the civil suits came before a judge other than the one before whom the criminal action had been heard and he ruled that the civil plaintiffs could not prevail unless the receivership established in the criminal case was found to be void. He refused to invalidate the receivership,

he quashed the writs of garnishment, and denied the motion to transfer the funds to New Jersey. The judge recognized that the validity of the appointment of a receiver in a criminal case was the controlling question of law in the disposition of the claims of the civil plaintiffs, and was a matter about which there could be substantial difference of opinion. He formally made these findings for review under 28 U.S.C. § 1292.

In addition to this, the Colorado plaintiffs have petitioned this court for a writ of prohibition directed against the receivership. Finally, there was an appeal pending from the denial of a motion filed by the New Jersey class plaintiffs in the Colorado criminal case requesting the transfer of the funds to New Jersey. These cases are consolidated to consider the question whether the receivership established in the criminal case is valid.

The district court's power to provide for restitution is created by the statutes relating to probation and suspension of sentences. Thus 18 U.S.C. § 3651 provides in part that:

> "While on probation and among the conditions thereof, the defendant—
>
> . . . .
>
> "May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and. . . ."

The statute does not delineate what, if any, special powers are granted to the sentencing court to create means by which restitution might be accomplished. This restitution is part of the criminal and sentencing procedure under the statute.

Rule 57(b) of the Federal Rules of Criminal Procedure gives courts latitude in fashioning special procedures. This section reads:

> "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

There is no convincing claim that any rule or statute makes the order in question "unlawful" nor that it is necessarily inconsistent with statutory law. Instead the parties in the civil actions urge that there is an absence of express authority and thus of jurisdiction to create the receivership.

The appellants urge that the legislative history as well as some judicial interpretation of Rule 57(b) suggests that it was directed to alleviate possible conflicts between state and federal procedures, and that it cannot be used to justify such an unusual practice as is here in question. 8B Moore's Federal Practice ¶ 57.03 at 57-4 (2d ed. 1965). However, legal and practical considerations militate against such a narrow interpretation.

Congress' enactment of the provision providing for restitution must contemplate sufficient flexibility and authority in criminal proceedings to accomplish restitution in a great variety of circumstances. In Blue Cross Ass'n v. Harris, 662 F.2d 972, at 978, the Eighth Circuit observed:

> "It is a commonplace of statutory construction that a legislative grant of a power carries with it the right to use the means and instrumentalities necessary to the beneficial exercise of that power."

See also Daly v. Stratton, 326 F.2d 340 (7th Cir.). Thus, insofar as a receivership was necessary to accomplish restitution in these circumstances the authority to create the receivership should be considered as implicit in the power to order restitution.

As to changes taking place *after* defendant's trial, it is significant that by Public Law 97-291 restitution may now be ordered whether or not the defendant is placed on probation, and it has become a much more important part of sentencing. Reasons must now be expressed by the sentencing court if it does not order restitution in full. For purposes of this appeal it is important that these changes provide for much broader and flexible orders for restitution and new ways to enforce such orders entered in the criminal proceedings. But again there is

no machinery provided or required to accomplish the restitution itself. This matter is still left to the discretion of the sentencing court, and in our view this includes the receivership here in issue.

The considerations involving practical concerns have also been recognized. Courts are making increasing use of special probation orders suitable for particular cases. We have approved such devices. United States v. Lawson, 670 F.2d 923 (10th Cir.). The use of special provisions demonstrates the need for flexibility in orders which attempt to make effective use of the authority to fashion useful probation. The Ninth Circuit in United States v. Pierce, 561 F.2d 735, stated that the "practical needs of the probation system" are a consideration in determining the validity of special conditions on probation. *See also* United States v. Consuelo-Gonzales, 521 F.2d 259 (9th Cir.). Thus even if the receivership cannot be said to be a necessity but a practical and effective device to assist in effecting the goals of the criminal system, it should be approved.

In a scheme like this one, where substantial sums of money are involved, the appointment of a receiver to invest and distribute the money is both necessary and beneficial to accomplish restitution. The functions to be performed are typically those of a receiver—only the setting is unusual.

The parties have cited three cases in the United States Courts of Appeal which involved receivership in the context of a criminal case. These are United States v. Roberts, 619 F.2d 1 (7th Cir.); United States v. Boswell, 605 F.2d 171 (5th Cir.); Patterson v. Stovall, 528 F.2d 108 (7th Cir.). In all of these cases, however, the receiverships were initially established through civil actions.

The usual practice of directing a probation officer to accomplish restitution is desirable where there are few claimants and where the amount of money is not great. However, where as here the interim investment of the money is necessary, where the identification of the persons entitled to restitution may be difficult, where the number of claimants is large and a pro rata

distribution of a large fund is necessary, a person with more specialized training is required. The expertise of the probation officers is in other fields.

The Colorado receiver is under control and direction of the court appointing him as are the receivership proceedings to accomplish restitution. There is no suggestion that there may be a delegation of authority to private litigants nor is restitution part of litigation among private parties. Thus there would seem to be a serious question whether the district court in Colorado could delegate restitution to be accomplished in such proceedings nor even by another receiver appointed in connection therewith.

A criminal proceeding in a United States district court is not in a separate compartment with the court exercising only a limited portion of its authority as the appellants argue. The federal courts obviously are of limited jurisdiction but the extent of the authority of the district courts in these circumstances is not limited or governed by whether the proceeding is criminal or civil. We find nothing in the decisions nor in statutory law which prevents the creation of the receivership in the criminal action here under consideration.

There is an important additional factor in the case which also leads to the conclusion we reach. This is the fact that the return of the money to the United States and restitution to the investors was part of the plea agreement between the United States and the defendant. It was reached during the course of defendant's trial. The defendant performed his part of the agreement in instructing the Grand Cayman bank to remit the funds to the United States. This was the only effective action to bring the funds into the registry of the court to permit restitution. It remains for this restitution to proceed to conclusion, for the plea agreement to be executed on the Government's side, and for the condition of probation to be met.

Thus the plea agreement, the return of the funds to the United States, the sentencing and the restitution are all interrelated parts of the proceedings in Colorado which started

with the indictment of the defendant in June of 1981. The restitution is the unexecuted part of this bundle and remains part of the sentencing. It is important that the Colorado proceedings thus continue on the track they are now on, and that nothing be done to jeopardize the restitution underway pursuant to the agreed transfer of funds and the plea agreement generally.

The New Jersey judge, Judge Stern, in his modification of the injunction indicated that the important thing was to have the transfer of funds accomplished. The fact that the funds would become locked into the Colorado proceedings may not then have been contemplated, but in any event, they became available to the investors which was the end sought in the class action. Judge Stern thus took all the action in the New Jersey suit that was possible to protect the investors and to prevent the defendant from dissipating the funds in the Grand Cayman bank. This, together with the action of the prosecutors in the plea bargaining, has made the money available for return to the investors. It makes no difference at this point what the Grand Cayman bank would or would not have done had the defendant not taken the action he did as part of the plea agreement as the funds were remitted, and they are under the control of the Colorado court for the eventual return to investors. Both the New Jersey court and the Colorado court are trying to have as much money as possible returned to investors. There appears to be no reason why they cannot proceed on parallel paths made necessary by the unusual circumstances and the origin of each action.

Each of the groups of parties in the civil proceedings urge that they did the most to bring the defendant to justice, to determine where the invested funds had been deposited, and were otherwise diligent in pursuing their claims. However, we cannot decide these appeals on the basis of which of the parties is entitled to the most equitable consideration. Again we must hold that the trial, the plea bargain, the return of funds to the United States, the receivership and the probation have all been interdependent elements of the Colorado criminal

proceedings. It is one package for all practical purposes, and should be there concluded as such quickly and efficiently as possible.

We hold that the Colorado receivership is valid in all respects and the funds therein held are in no way subject to garnishment.

The application for a writ of prohibition is denied in Case 82-1948.

In 82-1944 we affirm the denial of motions to transfer the receivership funds to the New Jersey class action or to a receivership there created and otherwise affirm the trial court.

In 82-2044 and 82-2045 we affirm the order of the trial court quashing the writs of garnishment and the denial of relief to the movants.

In 82-2046 we also affirm the order of the trial judge refusing to transfer funds to New Jersey and otherwise affirm the orders of the trial judge.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 81-CR-122

UNITED STATES OF AMERICA

Plaintiff,

v.

TRENTON H. PARKER, *et al.*,

Defendants.

ORDER AUTHORIZING RECEIVER

The United States has moved for the appointment of a receiver collateral to this case to effect restitution to persons defrauded as a part of a scheme of defendants. The defendants join in the request for such appointment and have agreed that cash funds and certificates of ownership for gold and silver bullion held by Barclay's Bank, Georgetown, Grand Cayman, be delivered to Daniel T. Smith and Robert T. McAllister, to be by them delivered into the Registry of the Court.

Accordingly, it is ordered that upon receipt of such funds and certificates of ownership for gold and silver bullion, the Clerk of this Court shall deliver and pay over such certificates and funds to the receiver to be hereafter named to hold in custodia legis. The receiver is ordered to invest such funds in Treasury Bills, certificates of deposit, or in other authorized and legal instruments pending the making of restitution to the defrauded investors. The Receiver is ordered to ascertain as promptly as possible the persons entitled to the funds and proceeds of the bullion certificates, and, subject to the approval of the Court, to make restitution to the defrauded investors on a pro rata basis, less fees and expenses to be approved by

the Court. The Receiver to be named shall not employ private counsel pending further order of the Court, and, at least for the present, the Receiver shall use as counsel the United States Attorney for the District of Colorado, or one of his assistants.

Dated this 9th day of February, 1982.

/s/ Fred M. Winner
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 81-CR-122

UNITED STATES OF AMERICA

Plaintiff,

v.

TRENTON H. PARKER, *et al.*,

Defendants.

ORDER APPOINTING RECEIVER

An order authorizing a receiver has been entered in this case. Following discussion with the United States Attorney and with defense counsel, and, with the approval of all, William C. Lam is appointed receiver pursuant to the order authorizing such appointment.

Dated this 9th day of February, 1982

/s/ Fred M. Winner
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

CASE NO. 80-K-850

ROBERT C. HERZFELD, *[Plaintiff]*,

v.

ROBERT C. HERZFELD, ADRIAN DOYLE, JAMES T. WILSON, STEPHEN SPANGLER, ROBERT E. NORWOOD, and INTERNATIONAL MINING EXCHANGE, a Colorodo corporation, *[Defendants]*.

CASE NO. 80-K-859

ROBERT F. BROWN, ROBERT A. BRANDT, and RFB PETROLEUM, INC., a Texas corporation, *[Plaintiffs]*,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., a Colorado corporation, R. STEVEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE, and ROBERT NORWOOD, *[Defendants]*.

CASE NO. 82-J-17

ELIZABETH EKEN, et al., *[Plaintiffs]*,

v.

INTERNATIONAL MINING EXCHANGE, INC., et al., *[Defendants]*.

KANE, J.

MEMORANDUM OPINION AND ORDER

This melange of litigation began in 1980 with my granting summary judgment for the plaintiff in *S.E.C.* v. *International Mining Exchange, et al.*, 515 F.Supp. 1062 (D. Colo. 1981). Because the three captioned cases, as well as others, were

related, they too, were assigned to me in keeping with our Local Rules of Practice. Such serious questions regarding the orderly administration of justice and jurisdiction exist that I will make findings which will permit an immediate appeal from this order in accordance with 28 U.S.C. § 1292(b). Arguably, these same findings may make the appeal a matter of right in accordance with 28 U.S.C. § 1292(a)(2).

Cases 80-K-850 and 80-K-859 were consolidated in September, 1980. They are civil securities fraud actions against Trenton H. Parker, International Mining Exchange and others based on fradulent tax shelter investment schemes. On September 8, 1981, I entered judgment for the plaintiffs against the defendants, Parker and International Mining Exchange, for $4,058,501. On February 9, 1982, the defendants Parker and International Mining Exchange in criminal action 81-CR-122 in this district before Judge Winner pleaded guilty to charges arising from the fradulent schemes. Pursuant to a plea arrangement Parker agreed to turn over the proceeds of the fraudulent scheme to the custody of a court-appointed receiver.

On February 9, 1982, Judge Winner appointed William C. Lam as the receiver and Assistant United States Attorney Robert McAllister and the defendant's counsel, Dan Smith, as Trustees. Judge Winner's order provides that upon receipt of Parker's funds and certificates, the receiver shall invest the funds in treasury bills, certificates of deposit, or other legal instruments pending restitution to the defrauded investors.

On April 16, 1982 Judge Herbert J. Stern of the District of New Jersey entered judgment against the defendants Parker and International Mining Exchange for $8,100,000 in a class action based on the same fraudulent scheme. Three days later, those plaintiffs filed a certification of their judgment for registration in the District of Colorado. This action, 82-J-17, was also assigned to me.

On April 22, 1982 the plaintiffs in the consolidated Colorado civil cases, 80-K-850 and 80-K-859, served writs of garnish-

ment with interrogatories on the receiver and the trustees. On July 12, 1982 the New Jersey plaintiffs also filed writs of garnishment. The parties have filed briefs in support of and in opposition to the registration of the New Jersey judgment in Colorado. In addition there has been substantial briefing on several motions including a motion to consolidate the civil actions and transfer the funds to New Jersey, a motion to dismiss or quash the Colorado plaintiffs writs of garnishment, a motion for replevin and a motion to certify the motion to dismiss the writs of garnishment to Judge Winner in the criminal case, 81-CR-122. At the last hearing on this matter, I denied the motion to certify the motion to dismiss the writs of garnishment to Judge Winner and the New Jersey plaintiffs withdrew their motion for replevin. Accordingly, this matter is now before me on the motion to consolidate the cases and transfer the funds to the United States District Court for the District of New Jersey, and the motion to dismiss or quash the writs of garnishment.

It is conceded by all parties that permission has neither been sought from Judge Winner nor given by him to institute garnishment proceedings against the receiver, Mr. Lam, who was appointed by him in the criminal case, 81-CR-122. *See Bankers'* v. *Mortgage Co. of Topeka, Kan.* v. *McComb*, 60 F.2d 218 (10th Cir. 1932). The plaintiffs in the consolidated actions, 80-K-850 and 80-K-859, argue that there is no inherent power which permits United States District Courts to appoint a receiver in criminal proceedings. No authority has been cited by any party and I can find none which addresses this question. *United States* v. *Roberts*, 619 F.2d 1 (7th Cir. 1979) is suggested, but it is inapposite since the receiver was not appointed by the judge in the criminal case.

The plaintiffs in the New Jersey class action likewise assert that Judge Winner was without jurisdiction in the criminal case to appoint a receiver and they therefore seek to have the funds in the possession of the receiver transferred to the court in New Jersey and there to establish a receivership. Predictably the plaintiffs in the consoldated actions assert that their

garnishment is first in time and that a subsequently established receivership will not defeat it. The class action plaintiffs rejoin by asserting that Judge Stern in the class action was the first to acquire jurisdiction over the funds in question and thus the garnishment in the consolidated actions is subservient. Further, the class action plaintiffs assert that fundamental justice would be thwarted by allowing the consolidated action plaintiffs to satisfy their judgment which is heavily loaded with punitive damages because that satisfaction would deprive the members of their plaintiff class of any recovery. I am therefore asked by them to deny the consolidated action plaintiffs' garnishment and order the funds transferred to the United States District Court for the District of New Jersey.

The arguments presented share a penultimate element: in order to rule favorably on any of the motions I would be required to determine that the order of Judge Winner establishing the receivership and appointing Mr. Lam as receiver is void for want of jurisdiction. This I cannot and will not do. The law on this point in the Tenth Circuit is stronger than in most jurisdictions.[1] In *Humphrey* v. *Bankers Mortg. Co. of Topeka, Kan.*, 79 F.2d 345, 352 (10th Cir. 1935) the Court of Appeals said:

> . . . It is well settled that in such circumstances the deliberate judicial acts of one judge are not open to review by another judge of the same court having co-ordinate jurisdiction. That is a salutary rule of comity which rests upon sound considerations of necessity. Any other would strike down orderly procedure and substitute unseemly conflict in its stead. The respective orders approving the petition and appointing a trustee in the involuntary proceeding could be reviewed only by appeal to this court.

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[1] There are numerous cases dealing with the problems inherent in one judge overruling another judge in the same case, but there are few cases reported involving a judge attempting to overrule another judge in a different case which deals with the same property. *See Annot. Propriety of Federal District Judge's Overruling or Reconsideration Decision or Order Previously Made In Same Case By Another District Judge*, 20 A.L.R. Fed. 13.

They were not open to review by the other judge of that court in the voluntary proceeding.

From the foregoing it is obvious that Judge Winner's orders are not subject to my review. Therefore, I deny the motion to consolidate the cases and transfer the funds to New Jersey and I grant the motions to dismiss or quash the writs of garnishment.

Another point needs to be made in order to explain my use of 28 U.S.C. § 1292. The plaintiffs in the three captioned cases are not parties to the criminal action and intervention there is not possible. *Bankers' Mortg. Co. of Topeka, Kan.* v. *McComb, supra*, at 222.[2] The only practicable way for the numerous parties litigant to obtain judicial resolution of these issues is for me to find that which this voluminous record fully justifies. Therefore, I find that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order will materially advance the ultimate termination of this litigation.

IT IS ORDERED that the motion of the class action plaintiffs in 82-J-17 to consolidate and transfer funds to the United States District Court for the District of New Jersey is denied,

IT IS FURTHER ORDERED that the motions to quash or dismiss the writs of garnishment are granted, and

IT IS FURTHER ORDERED that this memorandum opinion and order shall constitute my statement in writing required by 28 U.S.C. § 1292(b) so that the Court of Appeals may decide, in its discretion, whether to permit an appeal from this order.

DATED at Denver, Colorado this 26th day of July, 1982.

/s/ JOHN L. KANE, JR.
United States District Judge

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[2] Another approach is mentioned in *T.C.F. Film Corp.* v. *Gourley*, 240 F.2d 711, 714 (3d Cir. 1957), but its use in this circuit is unknown.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 81-CR-122

UNITED STATES OF AMERICA

Plaintiff,

v.

TRENTON H. PARKER, *et al.*,

Defendants.

ORDER

On July 26, 1982, in civil cases pending in this district and in New Jersey [80-K-850, 80-K-859 and 82-J-17], Judge Kane quashed writs of garnishment sequestering funds held by a receiver appointed by me in this case. The receivership is part and parcel of a plea bargain structured by the United States and defendants. It was approved by me pursuant to the requirements of Rule 11, F.R.Cr.P. and it was "embodied in the judgment and sentence." It is surely arguable that if the receivership be set aside, the consideration for the plea bargain fails and the plea was a nullity. I do not speculate about what would happen to the millions of dollars paid to the receiver for the benefit of defrauded persons as a part of defendants' agreement with the prosecution.

In his opinion and findings in the civil cases, Judge Kane correctly says that my permission to garnishee the funds was not asked. He ruled that he cannot pass on the legality of the receivership, and he did not pass on it. He certified the civil cases under 28 U.S.C. § 1292, but I am unclear as to what is the "controlling question of law as to which there is substantial ground for difference of opinion," and I surely fail to understand how my order of much more than 30 days ago appointing

a receiver is appealable now in another case. The only question actually decided by Judge Kane is whether funds in the hands of a receiver can be garnished without permission of the appointment court, and I have found no case which even hints that such a garnishment is legal. However, perhaps ingenious counsel can structure the case to obtain review of the undecided questions of the receivership's legality, and I agree that this is a close question.

Therefore, acting sua sponte, to protect everyone's interests pending further order of this court, I order that the receiver keep the funds intact, and that except for money necessary to the operation of the receivership and to provide explanations to the investors, the funds be invested in certificates of deposit secured in the manner funds in custodia legis must be secured. The receiver may pay necessary routine expenses such as bond premiums, office rent, postage and stenographic help, subject to the condition that any single expenditure in excess of $500 must have the written approval of this court, requested only after reasonable written notice to all parties in interest. All applications for attorneys' fees and receiver's fees shall be made in writing on reasonable notice to all interested persons who notify the receiver in writing that they desire such notice.

Dated this 26th day of July, 1982.

/s/ Fred M. Winner
United States District Judge

APPENDIX F

In re:

UNITED STATES

v.

TRENTON H. PARKER and
INTERNATIONAL MINING EXCHANGE

Criminal Case Nos.: 81-CR-122
82-CR-28

Statutes:	Parker:	188 U.S.C. §§ 1341, 1343 and 1623 26 U.S.C. §§ 7206(2) and 7203
	IME:	18 U.S.C. § 1341 and 1343 26 U.S.C. § 7203
Penalty:	Parker:	Count I—18 U.S.C. § 1341 NMT 5 years—NMT# $5,000—or both
		Count XI—26 U.S.C. § 7206(2) NMT 3 years—NMT $5,000—or both plus Costs of Prosecution
		Count I—Indictment of 82-CR-28 (18 U.S.C. § 1623) NMT 5 years—NMT $10,000—or both
		Count XVII—26 U.S.C. § 7203 NMT 1 year—NMT $10,000—or both plus Costs of Prosecution
		Count XIX—26 U.S.C § 7203 NMT 1 year—NMT $5,000—or both plus Cost of Prosecution
	IME:	Count I—18 U.S.C. § 1341 NMT 5 years—NMT $5,000—or both

Count VII—18 U.S.C. § 1343
NMT 5 years—NMT $5,000—or both

Count XX—26 U.S.C. § 7203
NMT 1 year—NMT $10,000—or both
plus Costs of Prosecution

Plea Agreement: The defendant TRENTON H. PARKER will plead guilty to Counts I, XI, XVII and XIX of Indictment 81-CR-122 and Count I of Indictment 82-CR-28. The government will dismiss Counts II thru X, XII thru XVI, XVIII and XX of Indictment 81-CR-122 and Indictment 82-CR-27.

The defendant I.M.E. will plead guilty to Counts I, VII and XX. The government will dismiss Counts II thru VI and VIII thru XIX.

Both defendants will immediately turn over to the custody of a court-appointed receiver all remaining proceeds of the scheme to defraud, all records indicating deposits and/or expenditures of all funds under their control. Both defendants will fully cooperate with a court-appointed receiver in his plans for restitution and fair distribution of funds to victims of the scheme. The court is not a party to this agreement nor bound by its terms pursuant to Rule 11, Fed.R.Crim.Procedure.

The government will not make any specific recommendations as to an appropriate sentence to be imposed. Sentencing will be a matter left to the discretion of the court. The government reserves the right to make known to the court all the facts involved in the scheme to defraud and to exercise its right of allocution under Rule 32(a)(1) of the Fed.R.Crim.Procedure.

PROSECUTOR'S STATEMENT

In the fall of 1978, TRENTON H. PARKER started selling purported gold tax shelters through a company called INTERNATIONAL MINING EXCHANGE, INC. (IME). PARKER was the president and sole shareholder of the company.

During the period, September, 1979, to April, 1981, PARKER represented to investors that IME could arrange for the sale to an individual investor a lease interest in a gold mining operation in either French Guiana or Alaska. PARKER further represented that IME would arrange for a foreign company to purchase an option on all the gold that could be mined on the leased property. Supposedly the taxpayers' investment money would be matched by an amount four times as great from the option purchaser. All of the money would then be used to pay development costs on the mining property in French Guiana and Alaska. Since the money was purportedly being used for mining development costs, the American investor could receive a 4 to 1 tax deduction on his personal or corporate income tax return for 1979 or 1980.

PARKER made extensive use of the mails and the interstate telephone lines in promoting the IME tax shelter. Robert Herzfeld on December 24, 1979 received a confirmation letter in the mail from IME. [Herzfeld invested $10,000.] Jerry Gatch spoke about the IME programs with PARKER via long distance from Texas on or about October 3, 1979. Later, Gatch's company, RFB Petroleum, Inc., invested $380,000.

American investors paid approximately 8.1 million dollars to IME. PARKER and IME told investors they were holding the money in escrow. Instead, the money was transferred to bank accounts in Switzerland and Grand Cayman Island. PARKER converted some of the money to his own personal use.

In order to give the appearance that the money was actually being spent, PARKER created a bank called the United Swiss Commonwealth. He also utilized a bank called the Wellington International Bank and Trust. He then caused to be issued bogus checks showing the disbursements of funds. The Wel-

lington Bank existed only on paper. The Wellington Bank did not have any physical facilities, accounts, employees, assets, or money. PARKER also caused to be printed up bogus cashiers checks indicating that funds were paid from various foreign banks in Switzerland and Italy. The Government's evidence would show that these foreign banks never issued or honored the checks.

PARKER also used answering services and mail drops throughout the world to give the impression that various companies were legitimate operating entities. Aurum and Argentum, American Hill Placer, and Seagull Creek Silver, Ltd. were companies that were actually incorporated. However, the companies existed in name only and had no real assets except for American Hill who had certain leasehold interests in Alaska. Katzswabe Mining and Engineering, Deutsche Kronen Mineralisch Anstalt, Compagnie Miniere Paul Isnard Internationale de France were not incorporated. PARKER caused to be hired an answering service and caused to be ordered letterhead stationery for these companies.

In order to support the investors' tax deduction, IME forwarded investors letters written by representatives of the entities listed above. Investors were told to use these false documents in order to claim a deduction on the Schedule C of their 1979 and 1980 income taxes. Specifically, Dr. Gene Bolles, listed in Count XI of the Indictment, invested $5,000 in the program. He then received false documents from IME to support a $30,000 deduction which he claimed on his 1979 Schedule C. Later the false documents were reviewed by the IRS and the deduction disallowed. Dr. Bolles would not have taken the deduction unless he was provided with false and fraudulent documents by IME.

Throughout the scheme, PARKER continually misled investors about the IME program and the development of gold property in French Guiana and Alaska. He said the properties were being actively developed and foreign option purchasers

had paid out four times as much money as the American investors. Those representations were false.

PARKER took a legitimate mining report and caused other mining claims to be added to it. He took a legal opinion allegedly prepared by a lawyer in California and had it printed up under the letterhead of a defunct tax firm called Cunningham, Richman, Appleby, Potter, and Young. He had corporate seals prepared and used the seals, stationery, legal and tax opinions in order to create an air of legitimacy and induce investors to purchase the IME tax shelter.

In December of 1979, PARKER testified under oath that he was the author or a legal opinion before Judge Sherman G. Finesilver. The opinion was in fact researched and written by someone else. PARKER lied while under oath about a material matter in that lawsuit. (Count I of Indictment 82-CR-28).

Finally, TRENTON H. PARKER failed to file Federal income tax returns for the calendar years 1977 and 1979 (Count XVII and Count XIX). During those years, he had a gross income in excess of $4,700.00 He willfully failed to file a personal income tax return or pay any Federal income taxes for those years. Additionally, IME failed to file a corporate income tax return for the calendar year 1979. During that year IME was in business, had substantial income, and was required by law to file an income tax return.

APPENDIX G

STATUTORY AND CONSTITUTIONAL PROVISIONS

Constitution of the United States of America Amendment 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 57, Rules of Court

(a) Rules by district courts. Rules made by district courts for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Court, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

(b) Procedure not otherwise specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

§ 3651 Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on a probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsibile.

The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation: Provided, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

The court may require a person who is an addict within the meaning of section 4251(a) of this title [18 USCS § 4251(a)], or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201) [42 USCS § 201(q)], as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title [18 USCS § 4255] for all or part of the period of probation: Provided, That the Attorney General certifies a suitable program is available. If the Attorney General determines that the person's participation in the program should be terminated, because the person can derive no further significant benefits from participation or because his participation

adversely affects the rehabilitation of other participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

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Nos. 82-1731, 82-1732 and 82-1815

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT C. HERZFELD, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO AND THE HONORABLE FRED M. WINNER, ET AL.

ROBERT F. BROWN, ET AL., PETITIONERS

v.

TRENTON H. PARKER, ET AL.

ELIZABETH EKEN, ET AL., PETITIONERS

v.

INTERNATIONAL MINING EXCHANGE, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was authorized to use the assistance of a receiver to effectuate a plan of restitution ordered as a condition of probation pursuant to 18 U.S.C. 3651.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Herzfeld Pet. App. 1a-12a)[1] is reported at 699 F.2d 503. The February 9, 1982 order of the United States District Court for the District of

[1] "Herzfeld Pet. App." refers to the Appendix to the Petition in No. 82-1731. "Brown Pet. App." refers to the Appendix to the Petition in No. 82-1732. "Eken Pet. App." refers to the Appendix to the Petition in No. 82-1815.

Colorado, authorizing a receiver (Herzfeld Pet. App. 13a-14a) (Winner, J.) is not reported. The July 26, 1982 memorandum opinion and order of the same court (*id.* at 16a-20a) (Kane, J.), denying a motion to transfer funds and quashing writs of garnishment, is not reported. The July 26, 1982 order of the same court (*id.* at 21a-22a) (Winner, J.), concerning the supervision of the restitution fund, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1983. Petitions for rehearing were denied on March 7, 1983 (Brown Pet. App. 19a-20a). Petitions for a writ of certiorari were filed on April 25, 1983 (Nos. 82-1731, 82-1732), and on May 5, 1983 (No. 82-1815). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1979, Trenton H. Parker, the International Mining Exchange, Inc. ("IME"), and others began promoting the "Gold Tax Shelter Investment Program." The program was a massive scheme to defraud investors through the use of a spurious tax shelter plan, and Parker and IME in fact defrauded investors of millions of dollars.[2] This scheme resulted in criminal and civil litigation in the United States District Court for the District of Colorado, and civil litigation in the United States District Court for the District of New Jersey.

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[2]In brief, the "Gold Tax Shelter Investment Program" invited investors to provide capital for the development of gold mines in French Guiana and Alaska and promised in return a tax deduction amounting to 500% of the investment and a share of the profits realized on the gold extracted from the mines. The scheme entailed the use of false representations, counterfeit documents, and fictitious business entities. See *SEC* v. *International Mining Exchange, Inc.*, 515 F.Supp. 1062, 1065-1066, 1070 (D. Colo. 1981).

2. In July 1981, a federal grand jury in the District of Colorado returned a 20-count indictment charging Parker, IME, and another IME officer with mail fraud, wire fraud, assisting in the preparation of false income tax returns, and failing to file income tax returns. The charges were based on the Gold Tax Shelter scheme.

On February 9, 1982, pursuant to an agreement negotiated at midtrial, Parker pleaded guilty.[3] The plea agreement called for Parker to transfer to the custody of the Colorado District Court the proceeds of his fraudulent scheme for the purpose of recompensing the defrauded investors (Herzfeld Pet. App. 24a). On the same day, the district court appointed a receiver to effectuate this aspect of the plea agreement.[4] The court ordered the receiver to take custody of the tainted proceeds, invest them, identify the defrauded investors, and subject to the court's approval, recompense the investors on a pro rata basis (Herzfeld Pet. App. 13a-14a). As a result of the plea agreement, Parker

---

[3]Parker pleaded guilty to one count of mail fraud (18 U.S.C. 1341), one count of perjury (18 U.S.C. (& Supp. V) 1623) (a charge brought in a separate indictment), one count of assisting in the preparation of a false income tax return (26 U.S.C. 7206(2)), and two counts of failing to file an income tax return (26 U.S.C. 7203). On the last four counts, Parker was sentenced to a total of eight years' imprisonment. On the mail fraud count, Parker's sentence was suspended in favor of five years' probation to begin at the end of his imprisonment.

[4]On March 26, 1982, the district court sentenced Parker pursuant to his guilty pleas. The court ordered that Parker's agreement to make restitution to the victims of his fraud be a condition of his probation under the mail fraud count. The court also ordered as a condition of probation that Parker "cooperate fully with the Receiver and the United States Attorney's office to insure appropriate and equitable settlement of all claims of such defrauded investors" (S. Tr. 8).

turned over to the Colorado District Court approximately $6 million.[5]

3. In July 1980, prior to Parker's guilty plea, petitioners Herzfeld, Brown, and RFB Petroleum, Inc., began separate civil actions, which were later consolidated, in the United States District Court for the District of Colorado against Parker, IME, and other defendants.[6] These actions arose from the same fraudulent scheme that led to Parker's indictment. The complaints alleged that the defendants had violated federal and state securities laws, committed common law fraud, and breached contracts, fiduciary duties, and warranties.

On September 8, 1981, the Colorado District Court entered a default judgment against the defendants for egregious abuse of the discovery process. The court awarded the plaintiffs approximately $4 million, a sum comprising actual and punitive damages, attorney's fees, and costs (Herzfeld Pet. App. 5a, 17a).

---

[5]Parker had been holding these funds in an account at a branch of Barclays Bank International, Ltd., located on Grand Cayman in the Cayman Islands. In February 1982, at Parker's request, the bank transferred approximately $5.6 million to an account at the United Bank of Denver opened by an Assistant U.S. Attorney and Parker's attorney, acting as trustees, for the purpose of receiving the funds. Later, the trustees transferred the funds to the registry of the Colorado District Court, and in late February and early March 1982 the clerk of the court transferred the funds to the receiver. The receiver immediately invested the funds in certificates of deposit. The $6 million figure represents the $5.6 million transferred from Grand Cayman and accumulated interest. The funds remain under the control of the receiver in interest-bearing certificates of deposit.

[6]Herzfeld filed his complaint on July 2, 1980. *Herzfeld* v. *Parker*, Civ. No. 80-K-850 (D. Colo.). Brown and RFB Petroleum filed their complaint on July 3, 1980. *Brown* v. *Parker*, Civ. No. 80-K-859 (D. Colo.).

4. In December 1981, also prior to Parker's guilty plea, petitioners Eken and Johnson filed a class action against Parker, IME, and others in the United States District Court for the District of New Jersey. This action, too, arose from Parker's fraudulent scheme (Herzfeld Pet. App. 5a, 17a). The complaint alleged that, in promoting and selling the Gold Tax Shelter Investment Program, the defendants had violated federal and state securities laws and state consumer-fraud laws, committed common law fraud, and breached contracts and fiduciary duties.

On January 29, 1982, the New Jersey District Court issued a temporary restraining order freezing the assets of Parker and IME then held in domestic and foreign banks, including the Grand Cayman branch of Barclays Bank International, Ltd., where Parker was holding approximately $5.6 million in assets. On February 9, the court extended the TRO and amended it to permit transfer of the assets of Parker and IME to the custody of the Colorado District Court. Later, on February 17, it issued a preliminary injunction substantially identical to the TRO, which permitted the transfer of Parker's assets to any federal district court (Herzfeld Pet. App. 6a-7a).

On April 16 and May 3, 1982, the New Jersey District Court provisionally certified the case as a class action on behalf of all investors in the "Gold Tax Shelter Investment Program" and entered a default judgment against Parker and IME for $8.1 million (Eken Pet. App. 3a-6a).

5. On April 19, 1982, the New Jersey plaintiffs instituted proceedings in the Colorado District Court to secure the transfer of the $6 million held by the Colorado receiver to the New Jersey District Court to satisfy their default judgment. Specifically, the New Jersey plaintiffs filed a certification of their judgment, a motion for consolidation with the Colorado plaintiffs' case, and a motion for transfer of

funds; they also served writs of garnishment on the Colorado receiver and trustees.[7] The Colorado plaintiffs, also seeking to satisfy their default judgment from the $6 million fund, served their own writs of garnishment on the receiver and trustees.

On July 26, 1983, Judge Kane issued an order disposing of these matters. Judge Kane reasoned that the central issue was the legality of the receivership established by Chief Judge Winner as an incident to Parker's guilty plea. Judge Kane held, however, that he could not consider that issue because he had no power to review an order of a coordinate judge. As a result, he denied relief to the New Jersey and Colorado plaintiffs and thus left the receivership unaffected. Judge Kane certified an appeal under 28 U.S.C. 1292(b) (Herzfeld Pet. App. 16a-20a).[8]

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[7] *Eken* v. *International Mining Exchange, Inc.*, Civ. No. 82-J-17 (D. Colo. filed Apr. 19, 1982).

[8] Later that day, Chief Judge Winner issued an order setting out in greater detail the authority and responsibilities of the receiver (Herzfeld Pet. App. 21a-22a). Subsequently, Judge Winner issued orders allowing payments for the receiver's expenses.

While the question of control over the funds held by the Colorado receiver was being litigated in the Colorado District Court, the New Jersey plaintiffs searched for additional assets of Parker and IME. As a result, on May 4, 1982, the New Jersey District Court ordered the Banque Nationale de Paris Guyane to transfer assets being held in Parker's name to the Midlantic National Bank in Newark, as receiver, for the benefit of the New Jersey plaintiffs. The court also ordered Parker to execute a document authorizing the transfer. Parker did not comply with the order; instead, on May 26, he executed a document assigning his interest in the assets in his account at the Banque National de Paris Guyane to the United States and authorizing the transfer of the assets to an account to be designated by one of the Assistant United States Attorneys in Colorado assigned to Parker's criminal case.

Officials of the Banque Nationale de Paris subsequently transferred approximately $400,000 to the Midlantic National Bank.

6. The court of appeals consolidated appeals in all these matters to consider the validity of the Colorado receivership (Herzfeld Pet. App. 1a-12a). The court held that the receivership was valid, relying principally on 18 U.S.C. 3651, which provides: "While on probation and among the conditions thereof, the defendant * * * [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had * * *." The court reasoned that the power to order restitution entailed the power to effectuate restitution, and concluded that the complexity of the restitution here necessitated the establishment of a receivership. The court also noted that Parker's plea agreement (Herzfeld Pet. App. 10a-11a) called for the transfer of the proceeds of his fraudulent scheme to a court-appointed receiver, who in turn was required to make restitution to the defrauded investors. Because the receivership was valid, the court of appeals affirmed the denial of relief to the Colorado and New Jersey plaintiffs (*id.* at 12a).

ARGUMENT

1. Petitioners contend (Herzfeld Pet. 7-13; Brown Pet. 7-14; Eken Pet. 17-19) that the Colorado District Court had no authority to appoint a receiver to effectuate the restitution plan agreed to by Parker and the government. This contention was properly rejected by the court of appeals and warrants no further review by this Court.

The authority of the district court to order restitution as a condition of Parker's probation is explicitly provided by statute: "While on probation and among the conditions thereof, the defendant * * * [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had" (18 U.S.C. 3651). Petitioners do not deny that Section 3651 empowered the district court to order restitution. Nor do they point to anything in the legislative history

of that statute that conflicts with the court of appeals' conclusion that the authority to order restitution entails the authority to use the means appropriate to accomplish restitution (Herzfeld Pet. App. 8a). See H.R. Rep. No. 1377, 68th Cong., 2d Sess. (1925). Instead, petitioners simply assert that the restitution order at issue is "unprecedented" (Herzfeld Pet. 9) and will profoundly affect the administration of criminal justice in the federal system.

Contrary to petitioners' assertion, the restitution order represents no departure from settled practice under Section 3651. Restitution orders have often involved large amounts of money. See *United States* v. *Barringer*, Nos. 82-5017(L) and 82-6159 (4th Cir. June 16, 1983) ($1.8 million); *United States* v. *Lynch*, 699 F.2d 839, 845-846 (7th Cir. 1982) ($100,000); *United States* v. *Grugette*, 678 F.2d 600, 604 (5th Cir. 1982) ($50,000); *United States* v. *Roberts*, 619 F.2d 1, 2 (7th Cir. 1979) ($750,000); *United States* v. *Tiler*, 602 F.2d 30, 33-34 (2d Cir. 1979) ($100,000); *United States* v. *Boswell*, 565 F.2d 1338, 1342-1343 (5th Cir.), cert. denied, 439 U.S. 819 (1978) ($71,000). As a result, courts have on occasion relied on the assistance of court officers to carry out a restitution plan. In *United States* v. *Roberts*, *supra*, the court of appeals approved a restitution plan in which a receiver was to identify the victims of a scheme to defraud, numbering more than 30,000, and distribute to them the $750,000 recovered from the defendant. 619 F.2d at 2. In *United States* v. *Boswell*, *supra*, a similar task was assigned to a probation officer. 565 F.2d at 1342-1343. The use of a receiver in this case to assist the district court in determining whom Parker defrauded and in what amounts breaks no new ground under Section 3651 and is entirely consistent with the purpose of that statute.

2. Petitioners Eken and Johnson claim (Eken Pet. 16-17) that the restitution order here conflicts with cases holding that such an order must identify the aggrieved parties and

the amount of their loss. These cases, however, are plainly inapposite, for they involved restitution orders imposing obligations on criminal defendants that were attended by substantial uncertainty. For example, in *United States* v. *Taylor*, 305 F.2d 183, 186-187 (4th Cir.), cert. denied, 371 U.S. 894 (1962), the amount owed by the defendant to the Internal Revenue Service (the defrauded party) had not been determined when he was ordered to pay his tax liability for previous years as a condition of probation. Similarly, in *United States* v. *Hoffman*, 415 F.2d 14, 21 (7th Cir.), cert. denied, 396 U.S. 958 (1969), the court held that "the conditioning of probation upon restitution of a sum of money to be [subsequently] determined is violative of 18 U.S.C. § 3651 * * *."

Here, by contrast, Parker's obligation to make restitution, which was agreed to during plea negotiations and made part of the plea agreement, was unambiguous: he was to turn over to the court "all remaining proceeds of the scheme to defraud" (Herzfeld Pet. App. 24a). Thus, Parker knew exactly how much money he was required to turn over as a condition of his probation and unlike the defendants in the cases on which petitioners Eken and Johnson rely, he does not challenge the restitution order. The conflict posited by petitioners Eken and Johnson does not exist and therefore provides no basis for review by this Court.

3. Petitioner Herzfeld contends (Herzfeld Pet. 14-16) that Section 3651 may lead to a restitution scheme that arbitrarily favors some aggrieved parties over others because of the requirement that restitution be limited to the " 'loss caused by the offense for which conviction was had.' " Specifically, Herzfeld argues that this requirement, coupled with the manner in which charges are brought in an indictment or a defendant's decision to plead guilty to certain counts, will result in inequitable restitution plans. Whatever merit this claim may have — and we submit it has none, see

United States v. *McMichael*, 699 F.2d 193, 195 (4th Cir. 1983) (scope of restitution not limited by counts to which defendant pleaded guilty); *United States* v. *Davies*, 683 F.2d 1052, 1054-1055 (7th Cir. 1982) (same); *Phillips* v. *United States*, 679 F.2d 192, 194 (9th Cir. 1982) (same); but cf. *Dougherty* v. *White*, 689 F.2d 142, 145 n.1 (8th Cir. 1982); *United States* v. *Buechler*, 557 F.2d 1002, 1007-1008 & n.10 (3d Cir. 1977) — the issue is not presented in this case. The restitution scheme ordered by the district court calls for restitution to all defrauded investors on a pro rata basis (see Herzfeld Pet. App. 13a). Clearly, no investor has been favored over another.

4. In any event the question of restitution under Section 3651 lacks continuing importance. Section 5 of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1253 (to be codified at 18 U.S.C. 3579-3580), substantially amended the law governing restitution. The 1982 Act describes when restitution may be ordered and prescribes procedures for issuing orders of restitution (96 Stat. 1253-1255).[9] These provisions now govern restitution in connection with all Title 18 offenses (96 Stat. 1253). Accordingly, there is no need for this Court to resolve questions about the proper interpretation of the terse language of Section 3651. If significant questions pertaining to restitution remain, they will be more adequately framed in cases arising under the new Act.

---

[9]The discussion in the Senate Report (S. Rep. No. 97-532, 97th Cong., 2d Sess. 33 (1982)) quoted by petitioners Brown and RFB Petroleum, Inc. (Brown Pet. 12), refers to a provision of the bill that was not enacted. Compare S. Rep. No. 97-532, *supra*, at 7, with 96 Stat. 1254.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., a Colorado Corporation, R. STEPHEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE and ROBERT NORWOOD,

Respondents.

REPLY BRIEF

I. THE BRIEF FOR THE UNITED STATES IN OPPOSITION DOES NOT ADDRESS THE MAJOR ISSUES PRESENTED BY THIS APPEAL.

Petitioners request that this Court determine whether a United States District Court may invoke the drastic *civil* equitable remedy of receivership in a criminal proceeding without express statutory authority. The assumption of equitable powers by a District Court in a

criminal proceeding is unprecedented. On the other hand, this Court has held in *Hammock* v. *Farmers Loan and Trust Company*, 105 U.S. 77, 26 L.Ed. 1111 (1882), that a receivership established without express statutory authority is illegal.

The opinion of the Tenth Circuit Court of Appeals creates an unprecedented expansion of Rule 57(b) of the Federal Rules of Criminal Procedure. The opinion denies property to classes of victims without due process of law by allowing a criminal to determine the victims he chooses to repay as part of his plea bargain agreement.

The Brief of the United States attempts to obscure and minimize the importance of the issues presented. The major issues are not addressed. The government merely asserts that restitution of large amounts of money has previously been accomplished. The precedent of this Court, the assumption of equitable powers by a Federal Criminal Court, the vast expansion of Rule 57(b) and the due process ramifications of allowing a criminal to decide which of his victims will receive restitution are ignored.

The Brief of the United States additionally contains substantial inaccuracies. The government charges that legislative history quoted by Petitioners Brown and R.F.B. Petroleum Inc., refers to a provision of the Victim and Witness Protection Act of 1982, which was not enacted. This assertion is erroneous. The legislative history cited by petitioners Brown and R.F.B. Petroleum Inc., specifically refers to 18 U.S.C. § 3579 which became law and is relevant in interpreting the jurisdictional reach intended by Congress. In addition, the government has misconstrued the cases which it has cited in its brief. The cases cited by government do not stand for the proposition that a receivership may be utilized to effect restitution in a criminal action.

The contentions which were raised in the Brief of the United States are addressed hereinbelow.

II. THE GOVERNMENT HAS CITED NO AUTHORITY WHICH SUPPORTS ITS POSITION THAT 18 U.S.C. § 3651 PERMITS A CRIMINAL COURT TO CREATE A RECEIVERSHIP TO EFFECT RESTITUTION.

The government cites several cases[1] in support of its position that the creation of a receivership does not represent a departure from settled practice under 18 U.S.C. § 3651. These cases are cited for the proposition that large amounts of money can be involved in restitution (see footnote 1). Petitioners have no dispute with this assertion. Two cases are also cited for the proposition that a court officer can be appointed to accomplish distribution. In both cases, however, the criminal court deferred to simultaneous civil litigation to determine distribution.

In *United States* v. *Boswell*, 565 F.2d 1338, 1342-1343 (5th Cir.) cert. denied 439 U.S. 819 (1978), the criminal court used a probation officer to hold monies of defrauded investors in trust, with the caveat:

> "The money was to be held under the control of the Court until such time 'as there has been a final determination of this matter,' an event to be anticipated when it became known how much, if anything, the state receiver had recovered for the depositiors from the net proceeds of the receivership."

In *United States* v. *Boswell*, *supra*, a receiver was not appointed by the criminal court to effect restitution under

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[1] *Barringer*, Nos. 82-5017(L) and 82-6159 (4th Cir. June 16, 1983); *United States* v. *Lynch*, 699 F.2d 839, 845-846 (7th Cir. 1982); *United States* v. *Grugette*, 678 F.2d 600, 604 (5th Cir. 1982); *United States* v. *Tiler*, 602 F.2d 30, 33-34 (2d Cir. 1979); and *United States* v. *Boswell*, 565 F.2d 1338, 1342-1343 (5th Cir.) cert. denied, 439 U.S. 819 (1978).

18 U.S.C. § 3651. The receiver was appointed in a civil state action.

In *United States* v. *Roberts*, 619 F.2d 1, 2 (7th Cir. 1979), the second case cited by the government, the receiver was not appointed in the criminal action. Again, the receiver was appointed in a separate civil action. The United States District Court for the District of Colorado correctly found this case to be inapposite. In his Memorandum Opinion And Order of July 26, 1982, Judge Kane stated:

> The plaintiffs in the consolidated actions, 80-K-850 and 80-K-859, argue that there is no inherent power which permits United States District Courts to appoint a receiver in criminal proceedings. No authority has been cited by any party and I can find none which addresses this question. *United States* v. *Roberts*, 619 F.2d 1 (7th Cir. 1979) is suggested, but it is inapposite since the receiver was not appointed by the judge in the criminal case.

Both cases cited by the government involve restitution in which the criminal court deferred to a receivership established by a civil court in a separate civil action.

In *United States* v. *Barringer*, Nos. 82-5017(L) and 82-6159 (4th Cir. June 16, 1983), also cited by the government in its brief, the Court specifically deferred to simultaneous civil litigation for the determination of the claim of an aggrieved party and for the determination of the amount of the claim:

> "First, Barringer's argument that there are no 'aggrieved parties' or any 'actual damages or loss' within the meaning of the statute ignores the fact that the special condition of probation imposed by the court plainly intended that no restitution be made until civil litigation is concluded. A judgment in the civil litigation in favor of Barringer's former employ-

> er will establish this employer as an aggrieved party and will also establish the amount of actual damages or loss. In the event of a judgment in favor of Barringer, the trust is to be terminated and all assets turned over to him. These provisions are consistent with the provisions of the statute."

The trust established by the criminal court in *U.S.* v. *Barringer, supra,* was not passing judgment upon the merits of the claims of defrauded investors. This issue was to be resolved in a separate civil action. See also *United States* v. *Tiler,* 602 F.2d 30, 34 (2d Cir. 1979), (also cited by the government).

The appointment of a receiver by a criminal court, in the case at bar, represents the first time that a criminal court has undertaken to determine the claims of the creditors and the priority of distribution. Therefore, the government's contention that the restitution order in the instant case represents no departure from settled practice is without merit.

III. THE RESTITUTION ORDER CREATED AN UNFAIR DISTRIBUTION SCHEME.

The Brief of the United States contends that the spectre of an unfair distribution scheme is not present in this case because all defrauded investors are to receive restitution on a pro rata basis. This is simply not true. The creditors are arbitrarily divided into two (2) classes: 1) investors in the 1979 and 1980 Gold Tax Shelter investment schemes, and 2) other creditors. The creditors in the first class receive restitution on a pro rata basis. After they are repaid in full, other creditors may receive repayment.

The other creditors have reduced their claims to judgments amounting to more than 1.4 million dollars. Under the restitution Order the creditors of this second class will

not share in any distribution until *all* persons who had invested in the 1979 and 1980 Gold Tax Shelter Investment Program have been paid in full.

The plea bargain and establishment of the receivership were consumated behind closed doors. It is apparent that the dictates of convicted criminal, Trenton H. Parker, resulted in the distinction between classes of creditors. Accordingly, an important issue of the denial of property without due process of law is squarely before this Court.

IV. THE MANNER IN WHICH A DISTRICT COURT MAY EFFECT RESTITUTION IS AN ISSUE OF CONTINUING IMPORTANCE UNDER 18 U.S.C. 3651, NOTWITHSTANDING THE ENACTMENT OF SECTION 5 OF THE VICTIM AND WITNESS PROTECTION ACT OF 1982.

The United States maintains that the issues in this case lack continuing importance by reason of the enactment of Section 5 of the Victim and Witness Protection Act of 1982, Public Law No. 97-291, 96 stat. 1253.

The authority of a criminal court to order restitution is contained in 18 U.S.C. 3651 which provides that as part of an order of probation, the Defendant "may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." Section 3651 is silent upon the issue of *how* restitution may be effected.

Section 5 of the Victim and Witness Protection Act of 1982, Public Law No. 97-291, 96 stat. 1253 prescribes procedures for ordering restitution. However, the Victim and Witness Protection Act of 1982 is *also silent* upon the issue of how the restitution, *once ordered*, may be effected. The dispute involving the method of accomplishing restitution is not more appropriately considered in a case where the restitution order is entered after comply-

ing with the procedures of the Victim and Witness Protection Act of 1982, *supra*.

The issue of how restitution would be effected is not likely to be presented in any more dramatic or compelling circumstances than are found in the instant case. Large sums of money are directly involved. A dispute exists between District Courts in different circuits. Large numbers of defrauded claimants, residing in many different jurisdictions claim an entitlement to restitution. There exists a conflict between the Federal Rules of Civil Procedure governing satisfaction of civil judgments and the Federal rules of Criminal Procedure regarding restitution.

The United States asserts that there is no need for this Court to resolve questions relating to the manner of effecting restitution under the grant of authority in 18 U.S.C. Section 3651. Upon closer examination, it becomes evident that these questions demand resolution because of the conflicts presented herein and because the manner in which a restitution order may be accomplished is not addressed by the Victim and Witness Protection Act of 1982, *supra*.

This case is of continuing importance for several further reasons. The use of a receivership to effect restitution represents a merger of the Civil and Criminal justice systems. If such a merger is to be sanctioned, it is incumbent upon this Court to consider the potential ramifications to federal criminal jurisprudence which could result.

In addition, the Tenth Circuit Court of Appeals has given a broad and unprecedented construction to Rule 57(b) of the Federal Rules of Criminal Procedure. Rule 57(b) of the Federal Rules of Criminal Procedure has not

previously been interpreted as an unrestricted incorporation provision so as to provide the District Court any power or authority known to the judiciary which it deems expedient in a given circumstance.

CONCLUSION

For the above reasons, Petitioners Robert C. Herzfeld, Robert F. Brown and RFB Petroleum would again urge that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

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